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338960—55——1

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. ——

THE UNITED STATES, PETITIONER

v.

RUSSELL H. WILLIAMS, D/B/A WILLIAMS EQUIPMENT CO., AND REED & MARTIN, INC., A CORPORATION

No. ——

THE UNITED STATES, PETITIONER

v.

GENERAL CASUALTY COMPANY OF AMERICA, CENTRAL SURETY AND INSURANCE CORPORATION, WACKER CORPORATION, AND N. E. DAUGHERTY, D/B/A N. E. DAUGHERTY CONSTRUCTION COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Court of Claims entered in the above-entitled cases on January 11, 1955.

OPINIONS BELOW

The opinion of the Court of Claims in *Williams* v. *United States*, No. 50403 (App. *infra*, pp. 1A–41A) is reported at 127 F. Supp. 617. The opinion of the Court of Claims in *General Casualty Company of America* v. *United States*, No. 47331 (App. *infra*, pp. 42A–86A) is reported at 127 F. Supp. 805.

JURISDICTION

The judgment of the Court of Claims in *Williams* v. *United States* was entered on January 11, 1955 (App. *infra*, p. 41A). The judgment of the Court of Claims in *General Casualty Company of America* v. *United States* was entered on January 11, 1955 (App. *infra*, p. 86A). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

P. L. 356, 83d Cong., 2d Sess., provides that an executive decision under the "finality clause" of the standard form government contract "shall be final and conclusive unless the same * * * is not supported by substantial evidence." The question presented is whether the Court of Claims misinterpreted the statute in these cases by substituting its own judgment on the facts for the choice made by the departmental officers between two conflicting views.

STATUTE INVOLVED

P. L. 356, 83d Cong., 2d Sess., provides, in pertinent part (68 Stat. 81):

> * * * no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> * * * * *

STATEMENT

Each of these cases arises out of the performance by respondents of a government construction contract containing the usual "finality clause." That clause—Article 15—provides that all disputes involving questions of fact shall be decided by the contracting officer, with the right of appeal to the head of the department "whose decision shall be final and conclusive upon the parties thereto." App. *infra,* pp. 13A, 51A. In both cases, respondents, being dissatisfied with

the resolution of various disputes, brought suit in the Court of Claims. That court reviewed their contentions, and in the claims involved in this petition set aside the administrative decisions as not supported by "substantial evidence"—the standard of review prescribed by P. L. 356, 83d Cong., 2d Sess. (*supra,* p. 3). While the facts in these cases are unrelated, the judgments rendered by the court below raise a single question of law common to both. We have therefore combined the petitions for certiorari in a single document.

1. *Williams* v. *United States,* No. 50403

The principal claim in this case, and the claim to which this petition is directed, relates to the amount of borrow material which was excavated by respondents and put in place on a road being constructed by respondents in Alaska.[1] The contract provided for payment for the material at $1.29 per cubic yard, and for payment for hauling it beyond a certain distance at a unit price of 32 cents per cubic-yard mile (Fdng. 5, App. *infra,* p. 12A). It further provided that the yardage of borrow excavated was to be "measured in original position [in the borrow pit] and computed by average end area method," that is, a profile of the pit should be made at the beginning and end of the quarrying operation and the vol-

[1] Borrow is earth removed from one location for the purpose of filling another.

ume of material calculated on the basis of these surveys. The overhaul item was similarly to be computed as "the product of the volume of the overhauled material, measured in its original position [in the borrow pit], in cubic yards, by the overhaul distance in miles and fractions thereof" (Fdng. 7, App. *infra,* pp. 13A–16A). In short, the method of computing the amounts due respondents was to be determined by starting from the amount of borrow in its original position.

The quarry designated as the source of the borrow had a face 100 to 125 feet in height and 650 feet in length The material consisted of micaceous schist and was excavated by power shovel which loaded the material into trucks (Fdng. 13, App. *infra,* p. 20A).

Before respondents began excavation work, the Government surveyed the quarry. The survey was done by making profiles of the face of the quarry at 25-foot intervals. This method is usually found reasonably accurate within a margin of error of 5 percent (Fdng. 14, App. *infra,* p. 21A).

Pending final determination of the amount of borrow excavated, progress payments were made on a truck measurement basis, *i. e.,* by calculating the load in each truck and multiplying that amount by the number of trips made by each truck (Fdng. 15, App. *infra,* pp. 21A–22A). The contract specifically provided that these

progress payments would not preclude the Government from showing the true amount of work performed (Fdng. 7, App. *infra,* pp. 15A–16A).

After 34,596 cubic yards of borrow, computed on the truck measurement basis, had been excavated, a large slide occurred at the quarry (Fdng. 17, App. *infra,* p. 23A). The slide covered approximately 500 feet along the face of the slope. Most of the movement of the material was within the area which had been cross-sectioned in the survey but an indeterminate amount came from without that area. Estimates of the amount of material involved in the slide varied from 30,000 to 400,000 cubic yards (Fdng. 17, App. *infra,* pp. 23A–24A). However, after the slide the material at no point extended substantially beyond the line at which respondents had started their excavation (Williams, Tr. 153, 226–233).

After the excavation work was completed, a final survey was made of the quarry. Since the original survey did not cover the entire area from which the material had slid into the quarry, the original profiles were extended by interpolations, under recognized engineering procedure, to cover areas not covered by the original survey. The use of interpolations "usually provides a reasonable degree of accuracy." Fdng. 22, App. *infra,* pp. 26A–27A. The final computation showed that a total of 69,349.7 cubic yards had been excavated, 64,735.9 cubic yards being allocated to

the roadway (the rest being discarded) (Fdng. 23, App. *infra,* pp. 27A–28A).

Respondents objected to this final estimate, contending that payment should be made on the truck measurement basis which had been used for progress payments (Fdng. 24, App. *infra,* p. 29A). On that basis, the total amount of borrow claimed was 99,592 cubic yards (Fdng. 19, App. *infra,* p. 25A). Conferences were then held with the contracting officer who made available to respondents all field books, profiles, and engineering data relating to the project (Fdngs. 25 and 26, App. *infra,* pp. 29A, 31A).

After checking the accuracy of his computation by a survey of the material in place on the roadway (Fdng. 25, App. *infra,* p. 29A), the contracting officer allowed a number of respondents' claims but denied the claims here in issue for excavation and overhaul of borrow (Fdng. 26, App. *infra,* p. 31A). Respondents then appealed to the Commissioner of Roads for Alaska, the designated representative of the head of the department. As an additional check on the accuracy of the amount determined by the survey of the pit, a further test of the truck load basis was made. It was determined that, based on the specific gravity of the material loaded and on careful loading to ideal capacity of every truck load for which respondents had been credited, a total of 76,000 cubic yards had been excavated. Since

under normal working conditions, the trucks would not be hand packed to ideal capacity, the Commissioner of Roads for Alaska concluded that when properly adjusted, the truck load basis confirmed the computation arrived at by the pit survey. Fdngs. 27, 28, App. *infra*, pp. 31A–35A. Subsequently, he denied respondents' request for reconsideration (Fdng. 28, App. *infra*, pp. 34A–35A). His final determination was that respondents were entitled to payment for 69,349.7 cubic yards of borrow and to payment for 217,032.4 cubic yard miles of overhaul (Fdng. 27, App. *infra*, p. 34A [2]).

On this record, the Court of Claims concluded that the decision of the head of the department was not supported by substantial evidence, stating that "the contradictory and conflicting evidence so detracts from the weight of the evidence in support of the decision as to leave it without substantial support." (App., *infra*, p. 7A). The court below also declined to accept respondents' claim that 99,592 cubic yards had been excavated. Instead, the court split the difference between that amount and the 69,349.7 cubic yards determined by the contract method and "found that 84,471 cubic yards of borrow material were excavated

[2] This determination represented a slight increase in the quantities which had been allowed by the contracting officer, the Commissioner recognizing for pay purposes 461.38 cubic yards of overburden which, although discarded, was to be included under the terms of the contract (Fdng. 23, 27, App. *infra*, pp. 28A, 34A).

which is 15,121.3 cubic yards more than that allowed by [the Government]." (App., *infra*, p. 8A).[3] Upon the basis of this finding, the court awarded respondents an additional $19,506.48 for excavation and an additional $16,222.53 for overhaul of the borrow.

2. *General Casualty Company* v. *United States*, *No. 47331*

The principal claim in this case, and the claim to which this petition is directed, is respondents' third cause of action for rock and shale excavation in the process of constructing an airport at Zanesville, Ohio. Section 3.3–b of the specifications expressly provided that "[a]ll excavated material will be classified as "Grading," or "Rock Excavation." (Fdng. 29, App., *infra*, p. 74A). "Grading" was defined by Section 3.3–b (1) to include (Fdng. 29, App., *infra*, p. 75A):

> * * * all loam, sand, clay, gravel, soft shale, soft slate, old gravel, broken stone or bituminous macadam pavements, loose or decomposed rock, boulders of less than one-half (½) cubic yard in volume and all other materials not otherwise classified under these specifications.

Paragraph (2) defined "Rock Excavation" to include (Fdng. 29, App., *infra*, p. 75A):

[3] 69,349.7 plus 99,592 equals 168,941.7. This figure divided by 2 equals 84,470.85, or, if whole numbers are used, the exact amount found by the court below.

> * * * all solid rock and boulders having a volume of one-half (½) cubic yard or more, and all shale or ledge rock which cannot be removed with an extra heavy duty rooter powered with a crawler-type tractor having 110 drawbar horsepower in good condition and on firm footing, or a modern power shovel of three-fourths (¾) cubic yard capacity in good condition, without continuous drilling or blasting; although blasting may be resorted to, to facilitate the work. * * *[4]

In the course of excavation, respondents encountered 216,755 cubic yards of shale which they contended constituted rock within the contract definition (Fdng. 35, App. *infra,* p. 80A). It was agreed that a test would be made to see if the material could be handled by a three-quarter cubic yard shovel without continuous drilling or blasting. "The shovel handled the materials with difficulty but was able to do so without drilling or blasting. The shovel did stick sometimes and it required several passes with the bucket to get a load, whereas in gravel, dirt, or clay this would not have been necessary" (Fdng. 34, App., *infra,* p. 79A). As a consequence of the test, the Government declined to pay for "rock."

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[4] A rooter is described by the court below as "a heavy blade which projects into the ground and operates on the principle of a plow" App., *infra,* p. 48A.

In completing the contract, respondents "did not rely solely on the three-quarter cubic yard shovel but used a one-yard shovel which had more power, approximately twice the weight of the smaller shovel, and was more efficient. The material could have been moved with the smaller shovel alone without blasting, but this would have required much additional time which was not available" (Fdng. 34, App., *infra,* p. 79A).

After completion of the contract, respondents filed a claim for rock and shale excavation, claiming again that the 216,755 cubic yards of shale was "rock." The contracting officer denied the claim on the ground that the result of the test "did not prove that the material encountered met the provisions of the specifications with respect to rock excavation since it was possible to remove the materials without undue difficulty." (Fdng. 40, App. *infra,* p. 84A). On appeal, the head of the department affirmed the decision of the contracting officer. In denying respondents' claim, he stated that "[i]t is mutually agreed that no drilling or blasting was resorted to in performing the excavation with the exception of 689 cubic yards for which you have been or will be paid at the contract price of $1.35 per cubic yard. * * * The contract is clear and specific with respect to the two types of excavation and inasmuch as the material removed did not fall within the definition of the "Rock Excavation" as set forth by the contract, there is no authority

for classifying such material as rock or for paying for its removal at any price in excess of the 25 cents per cubic yard specified by the contract for unclassified excavation" (Fdng. 41 App. *infra*, p. 85A).

On this record, the Court of Claims ruled that the determination of the head of the department "was not supported by substantial evidence" (App. *infra*, p. 54A). The court held that this shale was neither "grading" nor "rock" but constituted a changed condition for which respondents are entitled to judgment at the unit price of 65 cents per cubic yard—a total of $86,702 (App. *infra*, pp. 55A–56A).[5]

Judge Whitaker dissented, observing that "[h]ad I been the contracting officer I might have come to a contrary conclusion, but I cannot say that his conclusion was arbitrary or not supported by substantial evidence, because of the provisions of section 3.3–b of the specifications." (App. *infra*, p. 59A). Continuing, Judge Whitaker stated that "[t]he test showed that this shale

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[5] This equitable adjustment in the price was made under Article 4 of the contract which contained the standard provision for adjustment of the price in the event that the contractor encountered "during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications * * *" (Fdng. 30, App. *infra*, p. 76A).

could be removed with a power shovel of three-fourths cubic-yard capacity. It is true it was difficult to so remove it, but it was not impossible and, hence, there was a basis for the contracting officer's determination that the material did not come within the definition of 'rock excavation,' but within the definition of 'grading.' There were but two classifications of excavation provided for in the contract, to wit, 'grading' and 'rock excavation.' There was no intermediate classification." (App. *infra*, p. 59A).

REASONS FOR GRANTING THE WRITS

1. In a series of cases culminating in *United States* v. *Wunderlich*, 342 U. S. 98, this Court was called upon—because of what we have heretofore described as a "tendency in the Court of Claims to whittle away the authority of designated officers of the United States to make final decisions under contracts" (*United States* v. *Moorman*, 338 U. S. 457, 460n)—to determine the meaning of the "finality clause" of the standard form government contract. Repeatedly, this Court has held that the "finality clause" precludes independent judicial review of the evidence. In *Wunderlich*, the Court reiterated that "[t]he decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract" (342 U. S. at 100). Congress, however, subsequently provided in P. L. 356, 83d Cong., 2d Sess., that the decision of the department head under

finality clause" "* * * shall be final and conclusive unless the same is fraudulent * * * or is not supported by substantial evidence." (68 Stat. 81; *supra*, p. 3). While providing this broader scope of review, Congress did not accord contractors the right to a *de novo* judicial redetermination.

In the present cases, the first to be decided under P. L. 356, the Court of Claims seems to us once again to have departed from settled principles in this area and to have made ineffective the Government's attempt, expressly approved by P. L. 356, to provide in its contracts for the settlement of factual disputes without complex and protracted litigation. Although the court's opinions in these cases recite the new statutory limitation on the scope of review of determinations of the department heads, the new standard appears to have been misapprehended or seriously misapplied.

While the "substantial evidence" formula adopted by P. L. 356 prescribes a new standard of review for the Court of Claims in contract cases it has long been a familiar concept to courts called upon to review the orders of administrative agencies. "Substantial evidence" is generally understood as meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (*Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229); "it must be enough to justify, if the trial were

to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury" (*Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300). Further, the "substantial evidence" standard does not "negative the function of the [fact-finding agency] as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the [fact-finding agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488; cf. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, 508–509.

On these records, we think it clear that these principles have been ignored by the Court of Claims. Nowhere in its opinions in these cases does the court below purport to give any weight to the specialized knowledge of the government officials designated by the contracts as the final arbiters of factual disputes.[6] Nor does the court

[6] In the *Williams* case, for example, the designated representative of the head of the department was the Commissioner of Roads for Alaska, Col. John R. Noyes. Col. Noyes

hold that the evidence in support of the determinations challenged by respondents was so inadequate that a reasonable mind would reject it or that, if the trial were to a jury, the court would have been justified in directing a verdict for respondents. On the contrary, the court found only that "the substantial weight of the evidence supports an amount in excess of that allowed by the head of the department" (App. *infra*, p. 7A). In pointing this out, we do not mean to suggest that the court's responsibility for the reasonableness and fairness of factual determinations made by government officials under the "finality clause" can be discharged only by following a prescribed form of expression. On the contrary, an examination of what the Court of Claims actually did, in contrast with the general words in its opinions, discloses that,

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was graduated from West Point with a Bachelor of Science degree in 1923 and from Cornell University with a degree in Civil Engineering in 1926. He has been on active duty in the Army since his graduation from West Point and most of his work has been of an engineering nature. The contracting officer was Angelo F. Ghiglione. He received a Bachelor's degree from the University of Washington and a Master's degree from the Massachusetts Institute of Technology—both in Civil Engineering. Immediately after his graduation, he started working permanently for the Alaska Road Commission in 1933 and, except for a period of military service in the Navy Civil Engineering Corps, he has been continuously employed by the Alaska Road Commission. He was chief engineer of the Commission as well as contracting officer on the contract here involved. See Fdng. 10, App., *infra*, p. 18A.

in each of the instant cases, the court has substituted its own appraisal of the evidence for the choice made by the head of the department between "two fairly conflicting views" (*Universal Camera Corp.* v. *Labor Board*, 340 U. S. at 488).

(a) The factual issue in *Williams* was the amount of borrow material excavated by respondents and put in place on the road. As pointed out in the Statement, *supra*, pp. 4–5, the contract provided that measurement of the borrow was to be made by surveying the borrow pit before and after excavation (Fdngs. 7, 14, App. *infra*, pp. 13A–16A, 21A). This method is often used and is reasonably accurate within a margin of error of 5 percent (Fdng. 14, App. *infra*, p. 21A).

After 34,596 cubic yards of borrow, computed on a truck measurement basis, had been excavated, a large slide occurred at the borrow pit (Fdng. 17, App. *infra*, pp. 23A–24A). Despite the slide, no change was made in the contractual provision for measurement of the borrow (Fdng. 18, App. *infra*, p. 24A). At the completion of the work, a final survey was made of the borrow pit. Since the original survey did not cover the entire area from which material had slid into the quarry, the original profiles were extended by interpolations, which usually provide "a reasonable degree of accuracy," under recognized engineering procedure (Fdng. 22, App. *infra*, pp. 26A–27A). This computation showed

that a total of 69,349.7 cubic yards had been excavated, 64,735.9 cubic yards being allocated to the roadway (Fdng. 23, App. *infra,* p. 28A).

Respondents objected to this determination, arguing that the slide had made the contract method of computation impossible to apply (Fdng. 24, App. *infra,* pp. 28A–29A). The evidence as to the scope and extent of the slide was contradictory, with estimates of the amount of material involved varying from 30,000 to 400,000 cubic yards (Fdng. 17, App. *infra,* p. 23A). It appears, however, that the material after the slide did not extend at any point substantially beyond the line at which respondents had started their excavation (Williams, Tr. 153, 226, 233).[7] Respondents contended that payment should be made on the truck measurement basis which had been used for progress payments. On that basis, the total amount of borrow excavated was 99,592 cubic yards (Fdng. 19, App. *infra,* p. 25A).

As a check on the reasonable accuracy of the amount computed by the survey of the borrow pit, the contracting officer had a mass diagram prepared of the material in place in the road. This computation resulted in a determination of material in place of 66,566.5 cubic yards (Fdng. 25, App. *infra,* p. 29A). As noted above, the contract method had resulted in a total of 64,735.9 cubic yards allocated to the roadway. It should

[7] "Tr." refers to the separately numbered typewritten transcript of the testimony.

also be observed that the bid schedule estimated that 57,000 cubic yards would be required for the job and that that amount would yield, under compaction, approximately 62,700 cubic yards of embankment (Fdng. 9, App. p. 17A). Here too, there was conflicting evidence as to the accuracy of the computation. Respondents contended, and the court below found, that the mass diagram failed to take into consideration "indeterminate amounts of material" (Fdng. 25, App. *infra*. pp. 29A–31A). On the other hand, the Government's evidence showed that the quantity of material used as a result of mud boils or subsidence of the road did not exceed the allowance made in the original estimate for these eventualities (Foster, Tr. 67–69; Ghiglione, Tr. 401–402, 419–420; Noyes, Tr. 824–826; see Greimann, Tr. 348–350). It further showed that some additional material was required as the result of the movement of respondents' construction equipment over the road during construction—material for which respondents were responsible under the contract (Williams, Tr. 235–238; Greimann, Tr. 350–355; Zimmerman, Tr. 515–516; Pltfs.' Exh. 7, pars. 7, 12).

As an additional check upon the accuracy of the 69,349.7 cubic yard total computed by the survey method, a further test by use of a truck load basis was made. By this method, it was determined that, based on careful loading to ideal capacity of every truck load for which respond-

ents had been credited, a total of 76,000 cubic yards had been excavated (Fdng. 27, App. *infra,* pp. 31A–32A). Since under normal working conditions the trucks would not be hand packed to ideal capacity, the designated representative of the head of the department concluded that the specific gravity test was a reasonable confirmation of the computation arrived at by the survey method (Fdng. 28, App. *infra,* p. 35A). As was the case with the other tests, respondents also disputed, and the court rejected, the accuracy of this test (Fdng. 27, App. *infra,* p. 32A).

In thus summarizing the evidence, it has not been our purpose to show that the decision of the department head was "correct" or that the decision of the court below was "wrong." We have sought merely to suggest what is plainly demonstrated by the record—that the administrative determination in this case was a reasonable and careful appraisal of the conflicting evidence as to the effect of the slide upon the accuracy of the method of measurement prescribed by the contract. That respondents' opposing evidence was not sufficiently overwhelming to render the supporting evidence less than subtantial is shown by the fact that the court below did not accept the amount claimed by respondents. Instead, the court apparently gave equal weight to the supporting and opposing evidence and split the difference between the 99,592 cubic yards claimed by respondents and the 69,349.7 cubic yards de-

termined under the survey method, to arrive at a total of 84,471 cubic yards (Fdng. 29, App. *infra,* pp. 35A–36A).[8] In so doing, the Court of Claims clearly misapprehended the "substantial evidence" standard of review.

(b). The court's departure from the "substantial evidence" standard is even more striking in the *General Casualty Company* case. The factual dispute involved here is whether 216,755 cubic yards of excavated shale was "grading" to be paid for at 25 cents per cubic yard or "rock" at $1.35 per cubic yard. According to section 3.3–b of the specifications, "[a]ll excavated material will be classified as 'Grading,' or 'Rock Excavation'" (Fdng. 29, App. *infra,* p. 74A). "Grading" was defined by section 3.3–b (1) to include "soft shale * * * and all other materials not otherwise classified under these specifications." (Fdng. 29, App., *infra,* p. 75A). Paragraph (2) defined "rock" to include "all solid rock and boulders having a volume of one-half (½) cubic yard or more, and all shale or ledge rock which cannot be removed with an extra heavy duty rooter * * *, or a modern power shovel of three-fourths (¾) cubic yard capacity in good condition, without continuous drilling or blasting; * * *." (Fdng. 29, App., *infra,* p. 75A).

It is clear that these specifications were intended, and stated, to be all-inclusive; they specif-

[8] See note 3, *supra,* p. 9.

ically recognized the possibility that shale would be encountered, and that all the shale would be classified either as "grading" or as "rock." "Grading" would inevitably include materials which could be removed with varying degrees of facility. Loam and sand would be relatively easy to remove, while bituminous macadam pavements would involve greater difficulty. Some shale could be removed with a rooter (see fn. 4, *supra*, p. 10), and a three-quarter cubic yard shovel and hence would be classified as "grading;" on the other hand, shale which could not be so removed would be classified as "rock."

The findings below show that a test was made to see if the shale involved in this claim "could be handled by a three-quarter cubic yard shovel without continuous drilling or blasting. * * * The shovel handled the materials with difficulty but was able to do so without drilling or blasting. The shovel did stick sometimes and it required several passes with the bucket to get a load, whereas with gravel, dirt, or clay this would not have been necessary." (Fndg. 34, App. *infra*, p. 79A). In completing the contract, respondents "did not rely solely on the three-quarter cubic yard shovel but also used a one-yard shovel which had more power, approximately twice the weight of the smaller shovel, and was more efficient. The material could have been moved with the smaller shovel alone without blasting, but this would have

required much additional time which was not available." (Fndg. 34, App. *infra*, p. 79A).

Accordingly, what respondents in fact encountered was shale which could be removed with a three-quarter cubic yard shovel. Admittedly, it was difficult so to remove it, but it was not impossible. It clearly came within the "grading" classification of the contract but was near the upper limit of that classification because of the difficulty of removal. Here, as in *Williams*, therefore, the contracting officer was faced with a choice between two fairly conflicting views. Since there are only two classifications of excavation provided for in the contract, the material had to be classified as one or the other; there was no intermediate classification. The Court of Claims, however, not only rejected the contracting officer's choice but it also wrote a new, materially different, contract for the parties by awarding respondents judgment for the shale at the intermediate unit price of 65 cents. That result could be reached only by a serious misapplication of the "substantial evidence" standard.

2. Although P. L. 356 has placed limitations upon the conclusiveness of determinations made under a contractual "finality clause," if the clause is interpreted in accord with the intent of Congress it can still eliminate much unnecessary litigation. More, it can simplify the issues in litigation which is not entirely eliminated.

In the instant cases, the "finality clause" was not permitted to perform its proper function because of the Court of Claims' misapprehension of the scope of review prescribed by P. L. 356. The desirability of redefining the court's role at the outset of litigation under the "substantial evidence" standard of P. L. 356 makes it appropriate to grant review of these decisions. There will be a large number of cases involving P. L. 356 before the Court of Claims and an authoritative ruling at this stage will channel and guide this future litigation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writs of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

APRIL 1955.